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In The Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
As Next Friend of YASER ESAM HAMDI,

Petitioners,

v.

DONALD H. RUMSFELD;
W.R. PAULETTE, COMMANDER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* EXPERTS ON THE LAW OF WAR IN SUPPORT OF PETITIONERS

Of Counsel:
WIGGIN AND DANA LLP
One Century Tower
265 Church Street
New Haven, CT 06510
(203) 498-4400

HAROLD HONGJU KOH
Counsel of Record
MARY HAHN
ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN
RIGHTS CLINIC
127 Wall Street
New Haven, CT 06511
(203) 432-8368

MICHAEL H. POSNER
JONATHAN M. FREIMAN
HUMAN RIGHTS FIRST
333 Seventh Avenue,
13th Floor
New York, NY 10001-5004
(212) 845-5200

Attorneys For Amici Curiae Experts On The Law Of War

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are experts on international human rights and humanitarian law, sometimes referred to as the law of war.[1] *Amici* take no position on whether Petitioner Hamdi actually committed acts that might warrant his treatment as an enemy combatant for the Taliban. Nevertheless, they file this brief to challenge the President's unilateral decision to deny a United States citizen allegedly detained in a war zone the opportunity to challenge before a competent tribunal his exclusion from the protections of the Geneva Conventions.[2] This unilateral decision radically departs from established law and practice to which the United States and other civilized nations have faithfully adhered for the past fifty years. *Amici* include:

Mary Robinson served as U.N. High Commissioner for Human Rights from 1997 to 2002. She previously served seven years as President of the Republic of Ireland, and 20 years as Senator.

George H. Aldrich was the Head of the United States Delegation to the Geneva Conference on International Humanitarian Law from 1974 to 1977 and is Red Cross Professor Emeritus of International Humanitarian Law at Leiden University. He sits as a judge on the Iran-United States Claims Tribunal and formerly served as Deputy Legal Adviser of the Department of State.

Payam Akhavan served as Legal Advisor to the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia (ICTY).

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[1] Letters of consent to the filing of this brief accompany this brief. Pursuant to S.Ct. Rule 37.3, *Amici* certify that no counsel for a party authored this brief in whole or in part and that no person, other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* offer their analysis of the rights and obligations imparted by the Third Geneva Convention – and the import of those rights under the Supremacy Clause – independent of the other constitutional questions presented in this case.

Brigadier General David Brahms served as principal legal advisor for POW matters at Headquarters Marine Corps during the Vietnam War, senior legal advisor to the United States Marine Corps, and is now Executive Director of the Judge Advocates Association.

Jonathan Cedarbaum is a former Legal Officer and Deputy Chef de Cabinet in the Office of the President of the ICTY.

Mary Cheh is a Member of the Board of Directors of the National Institute of Military Justice, a Member of the Rules Advisory Committee of the U.S. Court of Appeals for the Armed Forces, and professor of law at George Washington Law School.

Rear Admiral Don Guter served in the Navy from 1977 until 2002, when he retired from the military. He served as the Navy's Judge Advocate General from June 2000 through June 2002.

Rear Admiral John T. Hutson served as Judge Advocate General of the United States Navy from 1997 to 2000 and is Dean and President of the Franklin Pierce Law Center.

Robert Kogod Goldman is the Co-Director of the Center for Human Rights and Humanitarian Law and Professor of Law and Louis C. James Scholar at American University, Washington College of Law.

Howard S. Levie held the Stockton Chair of International Law from 1971 to 1972 and was later named the Military Chair of Operational Law at the U.S. Naval War College. For twenty-one years, he served as a member of the Judge Advocate General Corps of the U.S. Army. He has been an emeritus professor at St. Louis University School of Law since 1977.

Georg Nolte is a Professor of Law and Director of the Institute of International Law at the University of Göttingen.

Diane F. Orentlicher is Professor of International Law, faculty director of the War Crimes Research Office, and

Co-Director of the Center for Human Rights and Humanitarian Law at the Washington College of Law at American University.

Donald G. Rehkopf, Jr., is a former active-duty member of the Air Force Judge Advocate General Department who served in the Republic of Korea and Germany. He is Co-Chair of the Military Law Committee for the National Association of Criminal Defense Lawyers and a member of its Select Committee on Military Tribunals.

Stephen Saltzburg is General Counsel for the National Institute of Military Justice and a professor of law at George Washington Law School.

Michael P. Scharf is a professor of law and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law.

Minna Schrag is a former senior trial attorney in the Office of the Prosecutor at the ICTY.

INTRODUCTION AND SUMMARY OF ARGUMENT

Faced with the torture and inhumane treatment of soldiers captured during the two world wars, nations throughout the world ratified the four Geneva Conventions nearly half a century ago. The third of these, the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter the "Third Geneva Convention" or "GPW"], confers upon captured soldiers substantive and procedural protections designed to check a detaining power's basest impulses. Central to these protections is a detainee's right to be treated as a prisoner of war ("POW"), unless and until his status – or even his innocence – has been determined by a "competent tribunal." *See* Third Geneva Convention, art. 5, 6 U.S.T. at 3322-24, 75 U.N.T.S. at 140-42.

The United States has ratified all four Geneva Conventions, thereby making them the supreme law of the land. U.S. Const. art. VI. It has also directly incorporated language from the Third Geneva Convention into binding

military regulations. Finally, it has faithfully adhered to the requirements of the GPW in every conflict since World War II and has forcefully encouraged other nations to do the same. The United States' compliance has been based on both legal obligation and enlightened self-interest: the nation's recognition that its commitment to the Conventions centrally promotes the protection of U.S. soldiers abroad.[3]

The United States' treatment of Petitioner radically departs from this settled law and longstanding military history. Yaser Hamdi is alleged to have been a soldier serving with Afghan government forces and captured on a battlefield by Northern Alliance forces, then transferred to U.S. custody. The Third Geneva Convention unambiguously requires that the detaining power treat him as a prisoner of war unless and until a competent tribunal decides otherwise. Despite the claim (through his next friend) that he is an innocent civilian swept up in the confusion of war, he has been detained indefinitely, virtually incommunicado, and without the protections mandated by the Third Geneva Convention, for nearly two years.[4] Respondents have unilaterally denied him POW

[3] The policy reason for respecting the Geneva Conventions – to ensure the safety of America's own troops abroad – is extensively discussed in the Brief by *Amici* Certain Former Prisoners of War submitted on behalf of Petitioner in this action.

[4] In December, the Department of Defense ("DoD") announced that it would permit Hamdi's counsel to meet with him for the first time. The DoD made clear, however, that these meetings would be permitted only as a matter of discretion. *See* Press Release, Dep't of Defense, DoD Announces Detainee Allowed Access to Lawyer (Dec. 2, 2003), *available at* http://www.defenselink.mil/releases/2003/nr20031202-0717.html. The DoD later announced that meetings between Hamdi and his counsel would be recorded and conducted under the close supervision of military personnel. *See* Jerry Markon, *Military to Watch Prisoner Interview*, Wash. Post, Jan. 31, 2004, at B3. At this writing, Hamdi's

(Continued on following page)

status, without ever bringing him before a competent tribunal charged with the responsibility of determining him ineligible for such treatment. Nor has Hamdi ever been afforded the opportunity to assert that he was never a combatant at all.

Hamdi now challenges this treatment, asserting in part that the Third Geneva Convention guarantees these basic dignities and fundamental procedural rights. The Fourth Circuit brushed aside the Third Geneva Convention's clear requirement that an individual captured on the battlefield be treated as a POW unless and until a competent tribunal has resolved any doubt as to his status. This ruling ignored military regulations directly incorporating those directives as well as this nation's long and proud tradition of convening tribunals before stripping a combatant of his prisoner-of-war status.

This Court should reverse the Fourth Circuit's decision and affirm the clear text of the Third Geneva Convention, which under the Supremacy Clause constitutes the supreme law of the land. The Court should reaffirm that the writ of habeas corpus is the proper mechanism by which the legality of detention may be challenged. Petitioner Hamdi should be permitted to assert his claim to civilian status before a competent tribunal.

counsel has apparently met with Petitioner once under these conditions of supervision.

I. THE FOURTH CIRCUIT RADICALLY DEPARTED FROM THE SETTLED UNDERSTANDING AND APPLICATION OF THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR.

For the past half century, the United States has consistently recognized the unambiguous directives of the Third Geneva Convention to be legally binding. The GPW requires all contracting parties, including the United States, to treat those captured in the course of armed conflict as POWs "from the time they fall into the power of the enemy and until their final release and repatriation." Third Geneva Convention, art. 5, 6 U.S.T. at 3322, 75 U.N.T.S. at 140 [hereinafter Article 5]. There is one – and only one – mechanism by which POW protections may be denied by the detaining power:

> Should *any* doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories [deserving of POW status], such persons shall enjoy the protection of the present Convention *until such time as their status has been determined by a competent tribunal.*

GPW, art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 142 (emphasis added); *see also* Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 847 Int'l Rev. Red Cross 571, 574-75 (2002) (stating that Article 5 creates a presumption of POW status). As the drafters of Article 5 made clear, the competent tribunal requirement ensures that "decisions which might have the gravest consequences [would] *not be left to a single person.*" Jean de Preux et al., *Geneva Convention Relative to the Treatment of Prisoners of War: Commentary* 77 (1960) [hereinafter *Official ICRC Commentary*] (emphasis added).

The meaning of Article 5 has been undisputed by the United States since its ratification of the Third Geneva

Convention in 1955.[5] Upon ratification of the treaty, the U.S. military immediately adopted regulations that recognized the competent tribunal requirement of Article 5. Dep't of the Army, Field Manual no. 27-10, *The Law of Land Warfare*, ch. 3, § I ¶ 71 (1956) (unamended by 1976 revision), *available at* http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/27-10/Ch3.htm [hereinafter *Law of Land Warfare*]. Today, every department of the United States military has implemented the requirements of the Third Geneva Convention through binding regulations regarding the treatment of wartime detainees:

> *All persons* taken into custody by U.S. forces will be provided with the protections of the GPW *until* some other legal status is determined by competent authority.

Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-5(a)(2) (1997), *available at* http://www.apd.army.mil/pdffiles/r190_8.pdf [hereinafter AR 190-8] (emphasis added).[6] The language of Article 5 is incorporated directly:

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[5] Like Article 5, binding customary international law also includes the principle that a competent tribunal must resolve any doubt about the status of a captured combatant. That is why, in 1987, then-Deputy Legal Advisor of the State Department Michael J. Matheson explained that the United States considered binding customary humanitarian law to include the "principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal." *See* Michael J. Matheson, Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, *reprinted in The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l & Pol'y 415, 425 (1987).

[6] This regulation was jointly promulgated by the Headquarters of the Departments of the Army, Navy, Air Force, and Marine Corps in Washington, D.C. on October 1, 1997. *See id.*

> In accordance with Article 5, GPW, if *any* doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention *until such time as their status has been determined by a competent tribunal*.

AR 190-8 § 1-6(a) (emphasis added). The same authoritative source directs that a "competent tribunal [of three commissioned officers] shall determine the status of any person not appearing to be entitled to prisoner of war status . . . who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists." AR 190-8 § 1-6(b). Officers are trained to treat captives as POWs until their status is determined by a competent tribunal. *See, e.g.*, The Judge Advocate General's School, *Operational Law Handbook* 22 (William O'Brien ed., 2003) (instructing judge advocates to "advise commanders that, *regardless of the nature of the conflict*, all enemy personnel should initially be accorded the protections of the GPW Convention (GPW), at least until their status has been determined") (emphasis added); Dep't of the Navy, *The Commander's Handbook on the Law of Naval Operations* § 11.7 (1995) [hereinafter *Commander's Handbook*] ("Individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated"); *see also* Lieutenant Commander Stephen R. Sarnoski, *The Status Under International Law of Civilian Persons Serving With or Accompanying Armed Forces in the Field*, Army Law., July 1994, at 29, 33 ("The result [of the presumption in favor of POW status] is a well thought out scheme in which, regardless of the context, each individual is

consistently given the benefit of the doubt until his or her status is conclusively determined.").[7]

These military regulations explicitly provide detainees the opportunity to assert not only POW status, but also any claims of *innocence*, i.e., a claim that the detainee is not a combatant at all. Thus, the multi-force regulation authorizes a competent tribunal to determine whether a detainee is in fact an "innocent civilian who should be immediately returned to his home or released." AR 190-8 § 1-6(e)(10). This is precisely the sort of claim that Hamdi (through his father) makes here.

Respondents' failure to convene a competent tribunal to determine Hamdi's status not only contravenes these military regulations implementing Article 5 but also radically departs from the practices to which the U.S. military has faithfully adhered in every major conflict since World War II. *See* Jennifer Elsea, Congressional Research Service, *Treatment of "Battlefield Detainees" in the War on Terrorism* 29 (2002), *available at* http://fpc.state.gov/documents/organization/9655.pdf (stating that the United States "has in the past interpreted [Article 5] as requiring an individualized assessment of status before privileges can be denied"). During the Korean War, the

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[7] The U.S. Marine Corps instructs its future officers to adhere to the GPW in their treatment of enemy prisoners – even if the enemy itself has violated the GPW – for two reasons: "a. This country is a law-abiding nation. It abides by international law and expects its individual citizens, especially servicemen, who are official representatives, to do likewise. The damage to our national interest and the adverse reaction of world public opinion as a result of non-adherence to the Geneva Convention by Americans would be serious[; and] b. A treaty such as the Geneva Convention of 1949, once ratified by the Senate, becomes part of the 'Law of Land Warfare'. *Thus, violation of the Geneva Convention would be equal to violating a federal law.*" United States Marine Corps, *Lesson 9: Code of Conduct*, Lesson Plan for Naval Science 313: Marine Corps Leadership Theory and Techniques 9 (2003) (emphasis added), *available at* https://navy.rotc.psu.edu/NROTC%20Classes/313/NOTES/Lesson9/LP3008CodeofConductLesson9.doc.

United States military treated Chinese soldiers as POWs under the Convention, even though neither the United States nor the United Nations recognized the communist government. Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by U.S. Forces* (2002), *available at* http://www.hrw.org/backgrounder/usa/pow-bck.htm.

During the Vietnam War, the United States military directed that all combatants captured during military operations were to be accorded prisoner-of-war status, regardless of the type of unit to which they belonged. U.S. Military Assistance Command for Vietnam ("MACV"), Directive No. 381-46, Annex A (Dec. 27, 1967), *reprinted in Contemporary Practice of the United States Relating to International Law*, 62 Am. J. Int'l L. 754, 766-67 (1968) [hereinafter *Contemporary Practice*]. Another directive reiterated that "Article 5 [of the GPW] requires that the protections of the Convention be extended to a person who has committed a belligerent act and whose entitlement to [prisoner of war] status is in doubt *until such time as his status has been determined by a competent tribunal.*" MACV, Directive No. 20-5 § 2(a) (Mar. 15, 1968), *reprinted in Contemporary Practice*, *supra*, at 768 (emphasis added). MACV Directive 20-5 explicitly identifies the Third Geneva Convention as "applicable law." *Id.* at 771.

The United States continued this tradition of compliance during the 1991 Persian Gulf War. The U.S. Army convened 1,196 tribunals to resolve the status of individuals detained as enemy combatants during Operation Desert Storm. Dep't of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* app. L at 577 (1992), *available at* http://www.ndu.edu/library/epubs/cpgw.pdf [hereinafter *Conduct of Persian Gulf War*], *cited in* Dep't of the Army, *Law of War Workshop Deskbook* 79 (Brian J. Bill ed., 2000) [hereinafter *Law of War Workshop Deskbook*]. And in the most recent conflict in Iraq that commenced in 2003, the U.S. military has reported treating all detainees as POWs before holding Article 5 tribunals. *See* Dep't of Defense, Briefing on Geneva Convention, EPW's and War Crimes (Apr. 7, 2003), *available at* http://www.defense

link.mil/news/Apr2003/t04072003_t407genv.html; *see also* Dep't of Defense, Enemy Prisoner of War Briefing from Kuwait City (May 8, 2003), *available at* http://www.defense link.mil/transcripts/2003/tr20030508-0160.html (indicating that the military had convened approximately fifty to one hundred Article 5 tribunals). Thus, despite the Fourth Circuit's hypothesized concerns that granting proceedings before competent tribunals might interfere with the conduct of the war, *see, e.g.*, *Hamdi v. Rumsfeld*, 316 F.3d 450, 470-71 (4th Cir. 2003) [hereinafter *Hamdi III*]; *Hamdi v. Rumsfeld*, 337 F.3d 335, 342-43 (4th Cir. 2003) [hereinafter *Hamdi IV*] (Wilkinson, J., concurring in the denial of rehearing en banc), in practice, the United States military has consistently proven itself fully capable of complying with the clear directive of Article 5 during wartime.[8]

Paradoxically, the United States invokes the laws of war as the source of its authority to detain Petitioner, yet refuses to abide by the clear mandates of the Geneva Conventions that lie at the heart of these laws of war. The government asserts that Hamdi has no right to challenge the deprivation of his POW (or civilian) status under Article 5 because the Executive Branch has unilaterally determined that there is no doubt that Taliban detainees, including Hamdi, are not entitled to POW status. (Opp. Cert. Brief at 29.) There is, however, an emerging consensus that cast considerable doubt on the Executive's categorical assertions about the status of the Taliban soldiers

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[8] Military regulations outline clear procedures governing the hearings before competent tribunals that balance individual fairness and military necessity. The panel consists of three commissioned officers and the individual's status is determined by majority vote of the panel. The determination is made based upon a preponderance of the evidence standard. The proceedings are presumptively open, except where security may be compromised. The detainee has a right to be present during open proceedings and is entitled to address the tribunal and present witnesses, where reasonable. Where military necessity requires otherwise, written submissions can substitute for live testimony. *See* AR 109-8 §§ 1-6(c), (e).

under the Third Geneva Convention. *See* H. Wayne Elliot, Crimes of War Project, *POWs or Unlawful Combatants: September 11 and Its Aftermath* (2002), *at* http://www.crimesofwar.org/expert/pow-elliott.html (stating that no rationale exists for denying them POW status); Jonathan Turley, *Trials and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 Geo. Wash. L. Rev. 648, 756-57 & n.685 (2002) (stating that argument that Taliban fighters are not POWs is "virtually meritless"); Avril McDonald, *Defining the War on Terror and the Status of Detainees: Comments on the Presentation of Judge George Aldrich*, 2002 Humanitäres Völkerrecht 206, 208 ("The Tal[i]ban are entitled to be considered as POWs."). If, as the U.S. government now proposes, unilateral executive decisions about a detainee's status could foreclose all opportunity to assert POW or civilian status before a competent tribunal, Article 5 would be rendered a nullity. This Court should reject such an interpretation, which is squarely at odds with the text, history, and purpose of the Convention.

This categorical denial of POW protections for all combatants of the Taliban further ignores the fact that detainees like Petitioner claim to have been civilians who never fought with the Taliban at all. Moreover, this blanket denial of POW protections is at odds with the GPW's requirement of *individualized* determinations of status by a competent tribunal. *See* Naqvi, *supra*, at 574-75 ("States should not be able to unilaterally decide that no doubt has arisen for an entire group of captured persons who have taken part in hostilities.").

That categorical denial also contravenes fifty years of unbroken military practice. The U.S. military has consistently understood that "doubt arises and a tribunal is required *whenever* a captive who has participated in hostilities asserts the right to be a POW." George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 Am. J. Int'l Law 891, 898 (2002) (emphasis added). The Army's manual on the law of land warfare states that:

> [Article 5] applies to any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or has engaged in hostile activities in aid of the armed forces *and who asserts that he is entitled to treatment as a prisoner of war* or concerning whom any other doubt of a like nature exists.

Law of Land Warfare, *supra*, at ch. 3, § I ¶ 71 (emphasis added). U.S. Navy regulations advise naval officers that "individuals captured as spies or as illegal combatants *have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated.*" *Commander's Handbook*, *supra*, at § 11.7 (emphasis added). Hamdi, through his father, has made just such an assertion. (*See* Pet. for Cert. at 30-31.)

Petitioner is accused of possessing a firearm and affiliating and fighting with a Taliban unit before falling into the hands of the Northern Alliance. (Mobbs Decl. ¶¶ 3-4.) Yet even if these disputed allegations were assumed to be true, they would not license the government's sudden departure from longstanding military practice or its derogation from Article 5 of the Third Geneva Convention. Nothing in the record suggests that Hamdi was anything but an ordinary foot soldier for the Taliban. Taking up arms with the enemy, without more, does not justify denying Hamdi POW status or the opportunity to assert his claim before a competent tribunal – by definition, prisoners of war routinely engage in the kind of hostile acts alleged against Petitioner.[9] Yet in direct

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[9] Respondents label Hamdi an "enemy combatant" to suggest that he is not entitled to POW status. The term "enemy combatant" merely signifies a member of the armed forces of a nation with which the United States is at war. The government's use of this phrase improperly blurs the critical distinction drawn in the Geneva Conventions between privileged and unprivileged combatants. Privileged combatants, who fall within one of eight categories outlined in Article 4 of the Third Geneva Convention, are afforded full POW protections. Whether an individual falls within one of the Article 4 categories is a fact-intensive

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contravention of Article 5, Respondents have summarily deprived Hamdi of POW status without permitting a competent tribunal to resolve his challenge to this deprivation.

Moreover, Petitioner disputes that he is a combatant at all. *Hamdi IV,* 337 F.3d at 360 (Luttig, J., dissenting from denial of rehearing en banc). ("*[I]t simply is not 'undisputed' that Hamdi was seized in a foreign combat zone.*") (emphasis in original). Our military history demonstrates that claims of innocence are often adjudicated in favor of the detainee. The 1,196 tribunals convened during Operation Desert Storm resulted in 310 individuals being granted POW status. The remaining 886 detainees who presented claims before the tribunals "were determined to be *displaced civilians* and were treated as refugees." *Conduct of the Persian Gulf War, supra,* at 578 (emphasis added).

Nor does anything suggest that the risk of error during the recent war against Afghanistan was any less than during our past military engagements. Petitioner was taken prisoner by Northern Alliance forces and moved to two different prison facilities before being transferred into U.S. custody. (*See* Mobbs Decl. ¶¶ 4-5, 7.) Several detainees now released after months of captivity have made claims similar to those asserted by Petitioner – that they too were innocent civilians captured by non-U.S. troops in Afghanistan who were bounty hunters.[10] The

question. Where an individual asserts his POW or civilian status, only a competent tribunal convened under Article 5 can resolve these disputes.

[10] *See, e.g.*, Carlotta Gall, *Freed Afghan, 15, Recalls a Year at Guantánamo*, N.Y. Times, Feb. 11, 2004, at A3 (quoting released teenager who claims to have been captured by non-U.S. forces while looking for a job; "[the Americans] were good people . . . . I am angry with the Afghans who handed me over to the Americans. The Americans did not know what was happening."); Jan McGirk, *Pakistani Writes of His U.S. Ordeal*, Boston Globe, Nov. 17, 2002, at A30 ("Pakistani intelligence sources said Northern Alliance commanders could receive $5000 for each Taliban prisoner and $20,000 for a[n] [al] Qaeda

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Secretary of Defense has now admitted that detentions may have been overbroad. *See* Dep't of Defense, Secretary Rumsfeld Media Availability en route to Camp X-Ray, (Jan. 27, 2002), *available at* http://www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html ("Sometimes when you capture a big, large group there will be someone who just happened to be in there that didn't belong in there.") (remarks of Respondent, Secretary of Defense Donald H. Rumsfeld). Thus, doubt still exists about Petitioner's status under the Convention, which only an individualized hearing before a competent tribunal can resolve.

In sum, in violation of the Third Geneva Convention and half a century of consistent military practice, Petitioner has been stripped of prisoner-of-war protections, denied a hearing by a competent tribunal under Article 5, and detained virtually incommunicado in a military brig for nearly two years. Straightforward application of the legal mandates of the GPW and military regulations, supported by unwavering military practice, demands that Hamdi be considered a POW unless and until a competent tribunal determines otherwise.

II. THE FOURTH CIRCUIT'S REFUSAL TO ENFORCE ARTICLE 5 IGNORES THE TEXT, STRUCTURE AND HISTORY OF THE TREATY AND VIOLATES THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION.

Despite the binding nature of duly ratified treaties, the lower court dismissed Hamdi's habeas petition with the startling conclusion that the Third Geneva Convention poses "no purely legal barrier" to Hamdi's indefinite detention. *Hamdi III,* 316 F.3d at 469. In fact, a treaty's constitutional standing as supreme law of the land is well

fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess.").

established – and the text and history of Article 5 make clear that in any armed conflict to which the Geneva Convention applies, a captured individual must be treated as a POW unless and until a competent tribunal determines that he is not entitled to such treatment.[11] The Fourth Circuit's dismissal of Hamdi's petition effectively denies the GPW its legal status under the Supremacy Clause. It also ignores the federal statute on which Hamdi bases his petition, which plainly states that the writ of habeas corpus may be granted to a person who is "in custody in violation of the Constitution or laws or *treaties* of the United States." 28 U.S.C. § 2241(c)(3) (2000) (emphasis added).

A. The Supremacy Clause Requires That Hamdi Be Treated As A POW Unless And Until A Competent Tribunal Determines He Is Not Entitled To That Status.

The Supremacy Clause unambiguously declares:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. In parallel language, Article III explicitly confers on federal courts jurisdiction over cases involving treaties: "The judicial Power shall extend to all

[11] Although the Executive has denied POW status to Taliban combatants, Respondents concede that the Geneva Conventions cover the recent war against the Taliban. *See* White House Office of the Press Secretary, Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html ("[T]he President has determined that the Taliban are covered by the Convention.").

Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, *and Treaties made*, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1 (emphasis added). As this Court has long recognized, a ratified treaty "is a law of the land as an act of Congress is, whenever its provisions prescribe *a rule by which the rights of the private citizen or subject may be determined*. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Head Money Cases*, 112 U.S. 580, 598-99 (1884) (emphasis added).

Article 5 of the Third Geneva Convention, ratified by the United States nearly fifty years ago, *see* GPW, 6 U.S.T. at 3425, 3428, 75 U.N.T.S. at 242, 246, is indisputably the "supreme Law of the Land," and a U.S. court may employ it as a rule of decision to determine Hamdi's rights on a petition for a writ of habeas corpus. The Fourth Circuit avoided the clear text of the Supremacy Clause of the Constitution by invoking the doctrine of "self-execution" of treaties.[12] The court cursorily concluded that the Convention does not "evidence[] an intent to provide a private right of action." *Hamdi III*, 316 F.3d at 468 (quoting *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992)).[13] But by so saying, the Fourth Circuit

[12] A self-executing treaty is one that operates as law without requiring implementing legislation. *See Restatement (Third) of the Foreign Relations Law of the United States* § 111 para. 4 (1987) [hereinafter *Restatement*] ("An international agreement of the United States is 'non-self-executing' (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or (c) if implementing legislation is constitutionally required.").

[13] The Fourth Circuit summarily concluded that the Third Geneva Convention was not self-executing without any analysis of the text or history of Article 5. The self-executing nature of Article 5 of the Third Geneva Convention is established in Part II.B of this brief.

conflated two very different questions: whether the GPW provides a *private cause of action* and whether it is a binding treaty whose provisions a U.S. court is authorized to enforce as a *rule of decision* in a federal habeas proceeding.

The text of the habeas statute unambiguously allows a petition premised on "custody in violation of the ... *treaties* of the United States." 28 U.S.C. § 2241(c)(3) (2000) (emphasis added). The Third Geneva Convention constitutes such a duly ratified treaty under which habeas relief can be granted. Thus, the federal habeas corpus statute provides Hamdi with a cause of action and Article 5 of the Third Geneva Convention provides the rule of decision by which his claim for habeas relief should be decided. Reading the unambiguous text of the habeas statute, this Court declared more than a century ago, "we see no reason why [a petitioner] may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States." *Wildenhus' Case*, 120 U.S. 1, 17 (1887) (analyzing petitioner's treaty claims under nearly identical language of predecessor habeas statute).

U.S. courts have regularly understood that habeas relief can be granted whether or not a private cause of action for civil damages also exists. For example, prior to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971), and its progeny, this Court had expressly reserved the question whether a violation of various constitutional amendments gave rise to a cause of action for damages. Nonetheless, federal courts had routinely turned to the Fourth, Fifth, and Sixth Amendments as controlling *rules of decision* to determine whether habeas petitions should or should not be granted. *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment); *Mancusi v. DeForte*, 392 U.S. 364 (1968) (Fourth Amendment).

As the text and history of the Third Geneva Convention make clear, *see infra* Part II.B, Article 5 plainly "prescribe[s] a rule by which the rights of the private citizen or subject may be determined," *Head Money Cases*, 112 U.S. at 598-599. As such, under the Supremacy

Clause, Article 5 is "binding alike [on] National and state courts, and is capable of enforcement, and must be enforced." *Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 273 (1909).[14] Indeed, the U.S. Military has itself long recognized that the Convention – as a "law ... of the United States" – provides the binding legal rule by which this habeas petition must be judged. *See Law of War Workshop Deskbook*, *supra*, ch. 5, § IV(E)(3), at 85 (prisoners of war "have standing to file a Habeas Corpus action ... *to seek enforcement of their GPW rights*") (emphasis added).[15]

These precedents and military practice reflect the Framers' intent, as evidenced in the Constitutional text itself. As Justice O'Connor has explained, "domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations." Sandra Day O'Connor, *Federalism of Free Nations*, *in International Law Decisions in National Courts* 13, 18 (Thomas M. Franck & Gregory H. Fox eds., 1996).

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[14] *See also, e.g.*, *Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961) (relying on treaty as rule of decision to determine legality of state action in taking of property); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928) (relying on treaty provisions to uphold issuance of writ of mandamus against state official).

[15] *See also Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002) (declaring that the GPW "under the Supremacy Clause has the force of domestic law"); *United States v. Lindh*, 212 F. Supp. 2d 541, 553-554 (E.D. Va. 2002) ("[T]he GPW provisions in issue here are a part of U.S. law and thus binding in federal courts under the Supremacy Clause.") (footnotes omitted); *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) ("[I]t is inconsistent with both the language and spirit of [the GPW] and with our professed support of its purpose to find that the rights established therein cannot be enforced by individual POWs in a court of law. ...").

The Fourth Circuit claimed that if the habeas statute provided a cause of action, a habeas court granting a petition using a rule of decision derived from the Third Geneva Convention might constitute "a mechanism of enforceability that might not find an analogue in any other nation." *Hamdi III*, 316 F.3d at 469. But this speculative concern cannot justify the court's decision to ignore both the Supremacy Clause and the clear text of the habeas statute. The courts have long recognized the power of Congress to provide such a remedy.[16] *See* U.S. Const. art. I, § 8; *Restatement*, *supra*, § 906 cmt. b ("A state may provide a domestic remedy for its own violations of international law . . ."). In enacting the habeas statute, Congress has unambiguously allowed prisoners to petition courts for habeas relief based on treaty violations. Courts are required to give effect to this act of Congress and to hear habeas petitions that allege violations of a ratified treaty.[17]

While the precise facts surrounding Hamdi's capture remain in dispute, no one disputes that the U.S. government has denied him prisoner of war protections without convening a competent tribunal to determine his status, as required by Article 5. That denial violates the GPW and the constitutional provisions making that convention the supreme law of the United States, and it may properly be raised on a writ of habeas corpus.

[16] Indeed, the very nature of a domestic statute is that it "might not find an analogue in any other nation." *Hamdi III*, 316 F.3d at 469.

[17] Any putative concerns about interfering with military decisions of the Executive and Legislative branches, *see Hamdi IV* at 343-45 (Wilkinson, J., concurring in the denial of rehearing en banc), ignore the key fact that the political branches, by the act of treaty ratification, have already required that the U.S. military comply with the mandates of Article 5.

B. The Fourth Circuit's Reading Of The Convention Is Incompatible With The Text, History And Structure Of The Convention.

The Fourth Circuit did not deny that officials of the United States must abide by the Third Geneva Convention or that the clear text of Article 5 of the Convention requires treating a person captured in battle as a POW unless and until a competent tribunal finds he is not entitled to such treatment. Rather, it concluded that the GPW was "not self-executing" because it created only "diplomatically-focused rights." *Hamdi III*, 316 F.3d at 468-69. Yet this conclusion was not based on any analysis of the text, history, or structure of the Third Geneva Convention. In revising the Geneva Conventions after World War II, the United States sought "to ensure humane treatment of POWs – not to create some amorphous, unenforceable code of honor among the signatory nations." *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992). As the central procedural mechanism by which states parties would respect and ensure the rights of the Convention, Article 5 is clearly self-executing and enforceable in court even absent a cause of action under the habeas statute.

This Court has long recognized that rights established by treaty provisions are directly enforceable in federal court. *See, e.g.*, *Kolovrat v. Oregon*, 366 U.S. 187 (1961) (recognizing claim under treaty as defense against state proceedings); *Asakura v. City of Seattle*, 265 U.S. 332, 339-41 (1924) (recognizing private right of action for injunctive relief against enforcement of municipal ordinance in violation of treaty with Japan); *Chew Heong v. United States*, 112 U.S. 536 (1884) (holding that habeas petitioner could properly claim rights established by treaty with China). Most recently, this Court has held that a treaty is self-executing when "no domestic legislation is required to give the Convention the force of law in the United States," a condition plainly applicable here. *Trans World Airlines,*

Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984).[18] The straightforward provisions of the Third Geneva Convention, including Article 5, clearly "prescribe a rule by which the rights of the private citizen or subject may be determined." *Head Money Cases*, 112 U.S. at 598-599; *see also United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (holding that private rights established by treaty are enforceable). As a self-executing treaty provision, Article 5 of the GPW thus provides a cause of action that is separate and independent from that provided in the federal habeas statute.

Nothing in the Third Geneva Convention suggests that it is enforceable by states only. Whether under the habeas statute or as an independent cause of action, the *text* of the Convention makes clear that a captured soldier may directly invoke his personal rights. Article 6 states clearly that no agreement among States "shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the *rights that it confers upon them*." GPW, art. 6, 6 U.S.T. at 3324, 75 U.N.T.S. at 142 (emphasis added). The Third Geneva Convention expressly secures rights to "persons . . . who have fallen into the power of the enemy." GPW, art. 4, 6 U.S.T. at 3320, 75 U.N.T.S. at 138. The GPW repeatedly refers to "*persons* protected by the present Convention," GPW, art. 10, 6 U.S.T. at 3326, 75 U.N.T.S. at 144 (emphasis added), and to "protected persons," GPW, art. 11, 6 U.S.T. at 3326, 75 U.N.T.S. at 144. Article 7 provides that "[p]risoners of war may in no circumstances renounce in part or in entirety the *rights secured to them* by the present Convention." GPW, art. 7, 6 U.S.T. at 3324, 75 U.N.T.S. at 142 (emphasis added). Under the Fourth Circuit's interpretation, this article would nonsensically forbid prisoners of war to renounce individual "rights" that they do not

[18] When advising and consenting to ratification, the Senate recognized only a few provisions of the treaty that required domestic implementing legislation. *See infra* at 26.

possess. Article 78 further provides that prisoners "shall have the right to make known to the military authorities" their complaints about the conditions of their captivity. *Id.* at art. 78, 6 U.S.T. at 3566, 75 U.N.T.S. at 197. This article authorizes prisoners acting directly, not through their state's diplomats, to bring their claims to the detaining power. Yet ignoring this text, the Fourth Circuit simply asserted that a Convention replete with the language of individual rights should be read to rely *only* on diplomatic enforcement between states.

Similarly, the *history* and *structure* of the treaty make clear that Article 5 is self-executing. In 1949, states parties negotiated a substantially revised version of a prior international convention. The predecessor convention required signatory states merely to "respect[]" the convention. 1929 Convention Relative to the Treatment of Prisoners of War, art. 82, July 27, 1929, 47 Stat. 2021, 2059 ("1929 Convention") ("The provisions of the present Convention must be respected by the High Contracting Parties under all circumstances."). In 1949, the drafters crafted a new provision that requires states parties not only "to *respect*" the Convention, but also "to *ensure* respect for the present Convention in all circumstances." Third Geneva Convention, art. 1, 6 U.S.T. at 3318, 75 U.N.T.S. at 136 (emphasis added). The treaty makers underscored the significance of this change by moving this language about states' obligations from the rear of the document, Article 82 of the 1929 Convention, to the front, Article 1 of the 1949 Convention.

The additional language and the restructuring worked a fundamental change. By ratifying the Third Geneva Convention, each party necessarily undertook to treat it as binding law within its own legal system. As the official ICRC commentary to the Convention explains:

> By undertaking this obligation at the very outset, the Contracting Parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity. . . . It is rather a series of *unilateral engagements* solemnly

> contracted before the world as represented by the other Contracting Parties.

Official ICRC Commentary, *supra*, at 17-18 (emphasis added).[19]

To "ensure respect" for the Convention, the drafters introduced Article 5 as a key procedural innovation in the 1949 Convention. By requiring status determinations by a competent tribunal, the 1949 Convention created a new check on executive power that was markedly absent from the predecessor 1929 Convention. *Compare* Third Geneva Convention, art. 5, 6 U.S.T. at 3322-24, 75 U.N.T.S. at 140-42, *with* 1929 Convention, art. 82, 47 Stat. at 2059. The drafters of Article 5 recognized "that decisions which might have the gravest consequences should not be left to a single person." *Official ICRC Commentary*, *supra*, at 77. The drafters considered and expressly rejected a formulation of the new article that would have simply left status determination to a "responsible authority," such as Respondents here. Instead, the drafters insisted in Article 5 that the determination of a detainee's status should be made by a "competent tribunal." *Id*; *see also* Sarnoski, *supra*, at 32 ("The requirement for such a tribunal was intended to avoid the possibility of arbitrary decisionmaking . . . and to discourage summary executions.").

Like the drafting history, the *legislative history* surrounding the ratification of the Geneva Conventions by the United States reveals a deep understanding that the

[19] This Court's analysis of the non-self-executing nature of the 1929 Geneva Conventions highlighted the need for reform in the 1949 Conventions. *Johnson v. Eisentrager* emphasized that reciprocity and diplomacy were the "obvious scheme" of enforcement in those previous conventions. 339 U.S. 763, 789, n. 14 (1950). That scheme failed to prevent inhumane treatment of our soldiers and the drafters of the 1949 Geneva Conventions self-consciously sought to reform this ineffective scheme by providing individually-enforceable rights and – importantly – the Article 5 procedures.

act of ratification created legally binding domestic obligations. In recommending advice and consent to ratification of the conventions, the Senate Foreign Relations Committee underscored that, with ratification, the United States would make *binding* what had previously been matters of mere policy and practice. The substantive provisions of the conventions would operate not as hortatory principles used mainly as rhetorical tools in diplomatic negotiations, but as legal *injunctions*:

> Our Nation has everything to gain and nothing to lose by being a party to the conventions now before the Senate, and by encouraging their most widespread adoption. As emphasized in this report, the requirements of the four conventions to a very great degree reflect the actual policies of the United States in World War II. The practices which they *bind* nations to follow impose no burden upon us that we would not voluntarily assume in a future conflict without the *injunctions* of formal treaty obligations.

S. Rep. No. 84-9, at 32 (1955) [hereinafter *Ratifying Report*] (emphasis added). The Committee urged strict adherence to the conventions, despite "the possibility that at some later date a contracting party may invoke specious reasons to evade compliance with the *obligations* of decent treatment which it has freely assumed in these instruments." *Id.* (emphasis added). The Committee concluded that adoption of these rights was the best way to secure better treatment for U.S. soldiers, based on the experiences of U.S. soldiers captured during the Korean War:

> If it be objected that the treatment of our soldiers captured in Korea by the Communists was in many respects ruthless and below civilized norms, it is also true that without the convention, that treatment could have been still worse.

Id. at 31.

To ensure that the conventions would be fully implemented by the United States, the Senate Foreign Relations Committee combed through the provisions of each of the four conventions to determine which provisions, if any, required implementing legislation. In reviewing the conventions, the Committee concluded that "it appears very little in the way of new legislative enactments will be required to *give effect* to the provisions contained in the four conventions." *Id.* at 30 (emphasis added). The Committee found only four provisions that required implementing legislation, none of which are applicable here.[20] Unsurprisingly, given the clarity of its textual requirements, Article 5 of the GPW was not included among those few provisions that the Committee understood to require implementing legislation. *Id.*

The Committee's conclusion that some *but not all* provisions required implementing legislation is consistent with this Court's recognition that treaties that contain provisions enforceable by the states parties may also include provisions that confer rights upon individuals

[20] The implementing legislation deemed necessary was as follows: 1. Changes in 18 U.S.C. § 706 relative to restrictions on the use of the Red Cross emblem by commercial enterprises; 2. Legislation to provide workmen's compensation for civilian internees; 3. Legislation to exempt relief shipments from import, customs and other dues; 4. Penal measures to enforce provisions that prisoner of war camps must be identified by the letters PW, PG or IC. *Ratifying Report*, *supra*, at 30-31. In contrast, the Committee viewed the requirement under Article 129 that states parties criminalize "grave breaches" of the Conventions already to have been met by the existing criminal code. *Id.* at 27. When the Senate determined decades later that American obligations under Article 129 were not being fully met by existing criminal statutes, Congress enacted the War Crimes Act of 1996, 18 U.S.C. § 2441 (2000), to bring the U.S. into compliance with its obligations under the Geneva Conventions. *See* H.R. Rep. No. 104-698, at 1 (1996) (stating purpose "[t]o carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes.").

"which are capable of enforcement as between private parties in the courts of the country." *Head Money Cases*, 112 U.S. at 598 (analyzing provisions of treaty separately to determine whether they are self-executing); *see also Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001); *Restatement*, *supra*, § 111, cmt. h ("Some provisions of an international agreement may be self-executing and others non-self-executing."). Yet ignoring this Court's longstanding self-execution analysis, the lower court simply asserted that a brief reference to diplomatic measures in two articles of the GPW rendered the entire GPW non-self-executing. Two invocations of diplomacy elsewhere in the lengthy convention do not negate the self-executing nature of Article 5.[21]

The lower court's assertion that diplomacy provides the sole mechanism to vindicate the rights of the captured runs squarely contrary not only to text and ratification, but also to logic. The Third Geneva Convention was designed to have force in cases of armed conflict, i.e., precisely when unilateral respect for humanitarian law by states parties is most crucial, but normal diplomatic channels are least effective. *See Official ICRC Commentary*, *supra*, at 18. The drafters of the Convention were well aware that diplomatic measures contained in the 1929 Conventions had failed badly during wartime. *See id.* at 632 (analyzing ineffectiveness of Article 30 of 1929 Geneva Convention); A. Hammarskjöld, *Revision of Article*

[21] The Fourth Circuit relied heavily on the enforcement provision of Articles 11 and 132 of the Third Geneva Convention for its argument that the GPW's values are to be vindicated by diplomatic means alone. However, Article 11 invokes diplomatic means only "in cases where [states] deem it advisable;" it by no means limits the enforcement of the GPW to diplomacy alone. Article 132 likewise does not restrict the means by which Article 5 may be enforced, as the drafters chose to augment the predecessor of Article 132 with the more protective Article 5.

30 of the Geneva Convention, in International Committee of the Red Cross, *Report on the Interpretation, Revision and Extension of the Geneva Convention of July 27, 1929* at 83, 91 (1938). The very failure of these measures highlighted the need for rules directly enforceable by individuals. In the wake of World War II, the United States would hardly have entrusted the fate of its soldiers to diplomatic mechanisms that had already proven woefully inadequate. Indeed, the Fourth Circuit's insistence that Hamdi rely on diplomacy in this case would lead to a patently absurd result: clearly, reliance on diplomatic channels to vindicate Hamdi's Article 5 rights would be completely meaningless when the country detaining him is his own.[22]

In sum, by consenting to ratification of the Geneva Conventions, the Senate intended legally to bind the United States to policies that it had concluded were in the best interests of U.S. soldiers. Moreover, it intended to bind future Executives to obey the conventions, even while anticipating that future enemies might "invoke specious reasons to evade compliance with the obligations . . . freely assumed in these instruments." *Ratifying Report*, *supra*, at

[22] The Third Geneva Convention does not have a nationality requirement for POW status. Significantly, this omission contrasts with the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention), which expressly requires diversity of nationality with the detaining power as a precondition for protected status. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3516, 3520, 75 U.N.T.S. 287, 290; *see also* Howard S. Levie, *Prisoners of War in International Armed Conflict* 76 (1977) (concluding that international law requires "that any individual who falls into the power of a belligerent while serving in the enemy armed forces should be entitled to prisoner-of-war status no matter what his nationality may be, if he would be so entitled apart from any question of nationality . . ."); R.J. Wilhelm, *Peut-On Modifier Le Statut Des Prisonniers De Guerre?*, 53 Revue Internationale de la Croix-Rouge 516, 685-88 (1953).

32. That binding obligation was to endure whether or not a future Executive shared President Eisenhower's concern that the United States "would not want to give [an enemy] the excuse or justification for treating our prisoners more harshly than he was already doing." Dwight D. Eisenhower, *Crusade in Europe* 469 (1948).

By ratifying the Convention, the political branches made it "the supreme law of the land, binding alike National and state courts, and [] capable of enforcement, and must be enforced in the litigation of private rights" to ensure that captured combatants are treated in accord with the Conventions. *Maiorano*, 213 U.S. at 273. Petitioner Hamdi is entitled to invoke those rights here.

The Fourth Circuit's anomalous conclusion that Article 5 rights may not be enforced by habeas petition, but only by diplomatic means, would leave the Convention's application subject not to law, but to the whim of the detaining country. The sad history of prisoners of war has amply demonstrated the danger of affirming such a result.

CONCLUSION

For nearly fifty years, the United States military has faithfully adhered to the unambiguous directives of Article 5 of the Third Geneva Convention. In detaining Petitioner without POW protections and denying him any opportunity to present his claim of innocence before a competent tribunal, the United States has radically departed from the mandates of the law and its own military tradition.

For the foregoing reasons, *Amici* urge this Court to reverse the judgment below, to reaffirm the status of the Third Geneva Convention under the Supremacy Clause,

and to confirm Hamdi's right to seek determination of his status before a competent tribunal.

Respectfully submitted,

HAROLD HONGJU KOH
Counsel of Record
MARY HAHN
ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN
RIGHTS CLINIC
127 Wall Street
New Haven, CT 06511[23]
(203) 432-8368

MICHAEL H. POSNER
JONATHAN M. FREIMAN
HUMAN RIGHTS FIRST
333 Seventh Avenue,
13th Floor
New York, NY 10001-5004
(212) 845-5200

Counsel for Amici Curiae

Of Counsel:
WIGGIN AND DANA LLP
One Century Tower
265 Church Street
New Haven, CT 06510
(203) 498-4400

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